(3)

No. 90-84

Supreme Court, U.S.
FILED
SEP 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

EDUCATION ASSISTANCE CORPORATION,
a South Dakota corporation,

Petitioner,

v.

LAURO F. CAVAZOS,
Secretary of Education of the United States,

Respondent.

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. IN SUPPORT OF EDUCATION ASSISTANCE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BEST AVAILABLE COPY

GEORGE G. OLSEN*
ROBERT E. JENSEN
WILLIAMS & JENSEN, P.C.
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 659-8201

**Counsel of Record*

Attorneys for Amicus Curiae

JEAN FROHLICHER
Executive Director
National Council of Higher
Education Loan Programs, Inc.
801 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 547-1571

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	3
ARGUMENT	5
I. Essential Participants in the GSL Program Rely on the Contracts Between Guaranty Agencies and the Secretary and Absent Such Reliance, Student Access to GSL Loans Would be Severely Curtailed	5
A. Structure of the GSL Program	5
B. Effect of the Decisions of the United States Courts of Appeals on the GSL Program	9
II. The Holdings of the Courts of Appeals that Guaranty Agencies Have No Property Interest in Their Reserve Funds Contravenes Long And Well-Established Relationships Among the Participants in the GSL Program	12
III. The Decisions of the United States Courts of Appeals Conflict with Earlier Important Decisions of this Court	16
CONCLUSION	20
Membership of the National Council of Higher Education Loan Programs, Inc. (1989-90)	1a

TABLE OF AUTHORITIES

Cases:	Page
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986)	18-19
Education Assistance Corp. v. Cavazos, 902 F.2d 617 (8th Cir. 1990)	1,12
Lynch v. United States, 292 U.S. 571 (1934)	16,17
Maryland Higher Education Loan Corp. v. Cavazos, 897 F.2d 1272 (4th Cir. 1990)	2
North Carolina and the North Carolina State Education Assistance Authority v. Cavazos, 897 F.2d 1272 (4th Cir. 1990)	2
Ohio Student Loan Commission v. Cavazos, 900 F.2d 894 (6th Cir. 1990)	1
Ohio Student Loan Commission v. Cavazos, 709 F. Supp. 1411 (S.D. Ohio 1988)	13
South Carolina State Education Assistance Authority v. Cavazos, 897 F.2d 1272 (4th Cir. 1990)	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS:	
Balanced Budget and Deficit Reduction Act of 1985 ("Gramm-Rudman-Hollings Act"), Pub. L. No. 99-177, 99 Stat. 1037 (1985)	4
20 U.S.C. § 1071 *et seq.*	3
20 U.S.C. § 1071(a)(1)(A), (D)	7
20 U.S.C. § 1072(e) (effective December 22, 1987 through September 30, 1989)	3,4
20 U.S.C. § 1078(c)(1)(A)	8,17,18
34 C.F.R. Part 682	14
LEGISLATIVE HISTORY:	
H.R. Rep. No. 383, 99th Cong., 2d Sess.	17,18

Table of Authorities Continued

Page

OTHER AUTHORITIES

The Implications of the Failure of the Higher Education Assistance Foundation, A Large Student Loan Guarantor, Hearings Before the Committee on Banking, Housing and Urban Affairs, 101st Cong., 2d Sess. 28 (July 27, 1990) 6

U.S. Department of Education, Office of Student Financial Assistance, *Loan Volume Update, 1st 6 Months of FY 1990* (1990) 5

U.S. Department of Education, *Reducing Student Loan Defaults—A Plan for Action 3 (1990)* 6

U.S. General Accounting Office, *Guaranteed Student Loans—Better Criteria Needed for Financing Guaranty Agencies* 32 (1986) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-84

EDUCATION ASSISTANCE CORPORATION,
a South Dakota corporation,

Petitioner,

v.

LAURO F. CAVAZOS,
Secretary of Education of the United States,

Respondent.

BRIEF OF AMICUS CURIAE NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC. IN SUPPORT OF EDUCATION ASSISTANCE CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The National Council of Higher Education Loan Programs, Inc. ("NCHELP") respectfully urges this Court to grant the petition of Education Assistance Corporation ("EAC") for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review the judgment in *Education Assistance Corp. v. Cavazos*, 902 F.2d 617 (8th Cir. 1990).

NCHELP also supports the petitions for writs of certiorari now pending before this Court in the following related actions: *Ohio Student Loan Commission v. Cavazos*, 900 F.2d 894 (6th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3053 (U.S. June 29, 1990)(No. 90-13); *South Carolina State Education Assistance Authority v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990), petition for cert. filed, 59

U.S.L.W. 3005 (U.S. June 22, 1990)(No. 89-2027); *State of North Carolina and the North Carolina State Education Assistance Authority v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3053 (U.S. June 26, 1990)(No. 90-4); *Maryland Higher Education Loan Corp. v. Cavazos*, 897 F.2d 1272 (4th Cir. 1990), petition for cert. filed, 58 U.S.L.W. 3787 (U.S. June 1, 1990)(No. 89-1873).

All parties have consented to the filing of this brief amicus curiae.

This Court must review these decisions because they establish principles of law which seriously undermine the critical relationships among guaranty agencies, lenders, the secondary market for student loans, and the Secretary of Education ("Secretary") upon which the successful operation of the Guaranteed Student Loan Program ("GSL Program") is predicated. By casting aside these long-standing legal relationships, these rulings, if allowed to stand, will materially impair the GSL Program's ability to make loans available to students who wish to pursue post-secondary education. The deleterious effects of these decisions will transcend the expiration of the "excess reserves" provision of the Omnibus Budget Reconciliation Act of 1987 because they drastically change the legal rights of guaranty agencies by allowing the Secretary to repudiate his contracts with guaranty agencies and by declaring that the federal government, and not the guaranty agencies, own the billions of dollars in the guarantors' reserve accounts.

These decisions will also have pernicious consequences far beyond the GSL Program. As the federal government becomes increasingly desperate to reduce the burgeoning federal deficit, the holdings will make it much easier for it to repudiate its obligations to private and state entities which participate in federal programs or are subject to governmentally-imposed restrictions on the use of their assets. Because these decisions controvert this Court's well-established precedents prohibiting the government from

meeting economic emergencies by abrogating its responsibilities and confiscating the property of its citizens, this Court should grant the petitions for certiorari.

INTEREST OF AMICUS CURIAE

NCHELP is a national association of organizations and business entities involved in guaranteeing, making, servicing, and collecting student loans pursuant to the GSL Program established by Congress under the Higher Education Act of 1965, as amended, ("Act") 20 U.S.C. §1071 *et seq.* (Supp. IV 1989). NCHELP represents virtually all of the state agencies and private, non-profit organizations which guarantee that lenders participating in the GSL Program will receive payment for any portion of a student loan which a borrower does not pay because of default, death, disability, or bankruptcy. NCHELP's membership also includes most state secondary student loan markets which service such loans and, more importantly, provide liquidity for additional student loans by purchasing loans from originating lenders. Affiliated members of NCHELP encompass other organizations integral to the GSL Program including commercial lenders, student loan servicers, collection agencies, legal and bond counsel, bond underwriters, and bond rating services. A current list of NCHELP's members is set out in the Appendix at pages 1a-5a.

Because of the diverse roles which its members play in the GSL Program, NCHELP has considerable expertise in the guaranteeing, making, and marketing of student loans. It understands the delicate balance which must exist among lenders, guaranty agencies, secondary markets, and the Secretary if the GSL Program is to be a viable means of assisting students in financing post-secondary education.

On December 22, 1987, Congress passed the Omnibus Budget Reconciliation Act of 1987 ("the Budget Act"), Pub. L. No. 100-203, Title III, Subtitle A, 101 Stat. 1330, 1330-36 to 1330-38 (1987). The "excess reserves" provision of the Budget Act (20 U.S.C. §1072(e)) required the Sec-

retary to seize $250 million from the reserve funds of guaranty agencies in order to assist Congress in meeting the budget reduction targets mandated by the Balanced Budget and Deficit Reduction Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985). This provision barred guaranty agencies from accumulating cash reserves in excess of certain amounts established pursuant to formulas specified in the statute. Guaranty agencies were required to eliminate any "excess cash reserves" by paying them over to the Secretary by one or more methods, including withholding or cancelling claims for reimbursement due from the Secretary under their contracts with him. If a guaranty agency did not transfer its excess reserves pursuant to one of these methods, the Secretary withheld reinsurance payments due to the guaranty agency under its written contracts with the Secretary.

The "excess reserve" provision will unravel the fabric of the GSL Program. The seizure of the reserves abrogates binding contracts between the Secretary and guaranty agencies. If these contracts can be unilaterally breached and retroactively changed by the Secretary, as the United States Courts of Appeals have held, an indispensable underpinning of the GSL Program will be shattered—the ability of guaranty agencies, lenders, and secondary markets to rely on the guaranty agencies' contracts with the Secretary. Without such reliance, student access to GSL Program loans will be substantially diminished.

Recognizing the severe threat which the "excess reserves" provision of the Budget Act posed to the GSL Program as well as their own fiscal soundness, twenty-six guaranty agencies which are members of NCHELP filed lawsuits challenging the lawfulness of that provision and the Secretary's implementation of it.[1]

---

[1] In addition to the five guaranty agencies which have petitions for writs of certiorari pending before this Court, twenty-one guarantors have brought lawsuits against the Secretary. *See Student Loan Guarantee Foundation of Arkansas, Inc. v. Cavazos*, No. LR-C-88-862 (E.D. Ark. filed Dec. 15, 1988); *Colorado v. Cavazos*, No. 88-C-2073 (D. Col.

ARGUMENT

I. Essential Participants in the GSL Program Rely on the Contracts Between Guaranty Agencies and the Secretary and Absent Such Reliance, Student Access to GSL Loans Would be Severely Curtailed

A. Structure of the GSL Program

The GSL Program is the nation's largest federal program providing financial assistance for post-secondary education to students who would not meet standard creditworthiness tests. Since the inception of the program through the end of FY 1989, more than $101.6 billion in financial aid has been provided through over 48.1 million loans.[2] Of this sum, more than $50 billion are still outstanding. In FY 1989 alone, 4.7 million loans were made by participating lenders totaling $12.4 billion.[3] Fifty-eight

---

filed Dec. 22, 1988)(consolidated with suits filed by Montana, New Mexico, North Dakota, and Utah); *Connecticut Student Loan Foundation v. Cavazos*, No. H89--182 (D. Conn. Jan. 10, 1990); *Delaware v. Cavazos*, 723 F. Supp. 234 (D. Del. 1989); *Georgia Student Finance Commission v. Cavazos*, No. 1:89-CV-160-MHS (N.D. Ga. filed Jan. 26, 1989); *Indiana v. Cavazos*, No. IP 89-125-C (S.D. Ind. Jan. 29, 1990); *Iowa v. Bennett*, No. 88-142-B(S.D. Iowa filed Mar. 15, 1988); *Maine State Board of Education v. Cavazos*, No. 88-0273-B (D. Me. filed Nov. 23, 1988); *Massachusetts Higher Education Assistance Corp. v. Cavazos*, No. 89-1325-K (D. Mass filed June 5, 1989); *Michigan Higher Education Authority v. Cavazos*, No. L89-400/8CA (W.D. Mich. filed Feb. 13, 1989); *Missouri Coordinating Board of Higher Education v. Cavazos*, No. 88-4576-CV-C9(W.D. Mo. filed Dec. 15, 1988); *New Hampshire Higher Education Assistance Foundation v. Cavazos*, No. C88-4-56-D (D.N.H. filed Nov. 16, 1988); *Puerto Rico Higher Education Assistance Authority v. Cavazos*, No. 89-3069-TFH (D.D.C. filed Nov. 9, 1989); *Rhode Island Higher Education Assistance Authority v. Carazos*, No. 89-0015T (D.R.I. filed Jan. 9, 1989); *Tennessee Student Assistance Corp. v. Cavazos*, No. 389-0261 (M.D. Tenn. filed Dec. 29, 1989); *Virginia State Education Assistance Authority v. United States*, No. 88-0874-R (E.D. Va. filed Dec. 1988); *Great Lakes Higher Education Corp. v. Cavazos*, No. 89-2748 (7th Cir. 1990).

[2] Office of Student Financial Assistance, U.S. Department of Education, *Loan Volume Update, 1st 6 Months of FY 1990* (1990).

[3] *Id.*

agencies across the country guarantee all GSL Program loans. Making student loans is a risky business: an estimated $7.8 billion in defaulted GSL Program loans will be outstanding in FY 1990.[4] Default costs to the GSL Program have increased eightfold since FY 1981 and in FY 1990, student loan defaults will consume nearly 44% of GSL Program expenditures.[5]

GSL loans are not made by the federal government; they are made by private lenders including commercial banks, savings and loan associations, credit unions, and other providers of financial services. These lenders are not required by any law to participate in the GSL Program. They are willing to make GSL loans only because guaranty agencies insure them against any losses on the loans which they may suffer because of default, death, disability, or bankruptcy of the borrower. A lender may seek repayment only from its guaranty agency if a loan goes bad. And, if the guaranty agency fails to meet its guaranty obligations there is no legal requirement that the Secretary make insurance payments to the lender. The Secretary's only duty is to reinsure the guaranty agency at its applicable reinsurance rate. Edward Stringer, the General Counsel to the Department of Education, recently confirmed this fact in testimony before the United States Senate Committee on Banking, Housing, and Urban Affairs:

> The federal government has no direct obligation to the lenders. The only obligation of the federal government in the program as it's now constituted is to honor on a reinsurance basis the claims put to the federal government that the guaranty agencies have properly honored to their lenders.
>
> So there is no direct connection with the lenders.[6]

---

[4] U.S. Department of Education, *Reducing Student Loan Defaults - A Plan for Action* 3 (August 1990).

[5] Id. at ii.

[6] *The Implications of the Failure of the Higher Education Assistance Foundation, A Large Student Loan Guarantor*, Hearings Before the

Because of the significant risks associated with student loans, a lender will not sign a lender agreement with a guaranty agency unless it is satisfied, after detailed financial and actuarial reviews, that the agency has sufficient reserves to make good on its guarantee. If a lender believes that guaranty agencies do not have sufficient reserves to cover its risk, the lender will not participate in the program or, at a minimum, will substantially curtail the number of loans it is willing to make.

Guaranty agencies are state agencies or private nonprofit entities existing under, and controlled by, the laws of the states in which they were established or incorporated. They were not created by Congress and several guaranty agencies were formed long before the Higher Education Act was passed. Furthermore, the Act does not mandate the establishment of guaranty agencies nor does it make them agents of the federal government or trustees for federal monies. To the contrary, the statute simply "enable[s] the Secretary (A) to *encourage* States and nonprofit private institutions and organizations to establish adequate loan insurance programs . . . and (D) to guarantee a portion of each loan insured under a program of a State or of a nonprofit private institution or organization which meets the requirements of section 1078(a)(1)(B) . . . ." 20 U.S.C. §1071(a)(1)(A),(D). Emphasis supplied. Therefore, while Congress intended to encourage guaranty agencies to participate in the GSL Program, it did not intend that they be subservient agents in a purely federal program.

Guaranty agencies participate in the GSL Program through a series of binding contracts with the Secretary. The "Basic Contract" recognizes an entity as a guaranty agency and provides lenders which receive the agency's guarantee with a federal interest subsidy. Agencies also enter into a "Reinsurance Contract" that requires the Secretary to reimburse the guaranty agency for 80% of the amount which it expends in the discharge of its insurance

---

Senate Committee on Banking, Housing, and Urban Affairs, 101st Cong., 2d Sess. 28 (July 27, 1990).

obligations, subject to the lender and the guaranty agency exercising due diligence in making, servicing, and collecting defaulted loans. A "Supplemental Reinsurance Contract" provides that the Secretary shall reimburse guaranty agencies for 100% of their insurance payments to lenders if their claims rate is less than 5% of the amount of loans in repayment at the end of the previous year. If the default rate is between 5% and 9%, the Secretary will reinsure the guaranty agency for 90% of insurance payments and 80% reinsurance is paid if the claims rate exceeds 9%. These contracts establish a legally enforceable right between the Secretary and guaranty agencies. The Act itself recognized that a "guaranty agency shall be deemed to have a contractual right, against the United States, during the life of such loan, to receive reimbursement [of insurance payments to lenders]." 20 U.S.C. §1078(c)(1)(A)(Supp. IV 1987).

Under the GSL Program, a guaranty agency must pay a lender for a default claim from its own funds before it can claim reinsurance from the Secretary. Reinsurance payments received from the Secretary are deposited into the guaranty agency's "reserve" or "guaranty" fund together with insurance fees charged to lenders, federal advances, administrative cost allowances, cost reimbursements for supplemental preclaims assistance, and money it is allowed to retain from post-default collections. As a general matter, all of a guaranty agency's financial resources are in its reserve fund. Therefore, the existing fund and the earnings it generates must be adequate to meet all of the agency's obligations to lenders as well as its administrative and operational costs over the life of the loans already guaranteed. If the guaranty agency's default rate should exceed the 5% or 9% triggers, or if the agency should fail to comply with the Secretary's complicated rules for handling loans, the agency would not receive 100% reimbursement from the Secretary. The guaranty agency would have to make up the difference from its reserve fund.

The secondary market ensures that lenders have sufficient liquidity for making student loans by buying loans from the lenders, often before they enter repayment. By assuming all servicing responsibilities for the purchased loans, the secondary market relieves lenders of the costly duties attendant to loan servicing. The secondary market raises its funds by selling bonds to underwrite the costs of purchasing loans from lenders. Investors are willing to buy bonds only if they are satisfied that the underlying loans are secured by the guaranty agency's reserve fund and protected by the agency's reinsurance contracts with the Secretary.

B. Effect of the Decisions of the United States Courts of Appeals on the GSL Program

The viability of the GSL Program is predicated upon the contracts between the Secretary and guaranty agencies as well as the adequacy of each guaranty agency's reserve fund to meet its insurance obligations to lenders. The decisions of the U.S. Courts of Appeals, however, held that Congress and the Secretary may repudiate contracts with guaranty agencies even though the agencies have fully performed their duties thereunder. They also ruled that Congress and the Secretary may unilaterally and retroactively change critical terms of the reinsurance contracts and confiscate reserve funds from the agencies without violating the agencies' constitutional or contractual rights. These rulings, if upheld, will devastate the GSL Program.

Guaranty Agency Participation. Guaranty agencies participate in the GSL Program because they have contractual rights to reinsurance payments from the Secretary and have been allowed to maintain reserves adequate to meet their responsibilities. Absent such enforceable rights and reserve funds, guaranty agencies have no way to meet their insurance obligations to lenders. The courts' decisions holding that Congress may direct the Secretary to walk away from his reinsurance obligations after a guaranty agency has paid its reinsurance premium and has performed its contractual duty by issuing its guaranty to lend-

ers destroys the essential underpinning of guaranty agency participation. In addition, the determination that the reserve funds are owned by the federal government deprives guaranty agencies of possession and control of the funds which they need to meet the enormous liabilities which are theirs alone to shoulder.

Lender Participation. Lenders make loans to students who otherwise would not be credit-worthy because guaranty agencies insure them against any losses arising out of a loan which goes bad. In determining whether an agency's guarantee is sufficient to protect them against the high risks associated with student loans, lenders rely on the enforceability of the agency's contracts with the Secretary as well as the adequacy of the agency's reserve fund. The decisions of the United States Courts of Appeals make it folly for lenders to rely on the contracts or reserves because they sanction repudiation of the contractual reinsurance obligation and seizure of agency reserve funds. They also declare that the guaranty agencies do not have ownership or control over their reserves because they are the property of the federal government. Since lenders have no legal obligation to make GSL Program loans, and cannot obtain reimbursement or insurance from the federal government for defaulted loans, many may cease making GSL loans. At a minimum, lenders can be expected to reduce substantially the number of loans they are willing to make. The net effect under the GSL Program will be a significant diminution in student access to federal financial aid.

Effect on Secondary Loan Markets. Faced with the prospect that contractual commitments to guaranty agencies may not be enforceable and with the possibility that Congress and the Secretary may take guaranty agency reserves at their whim, it is probable that the secondary market will dry up. Without the security of binding reinsurance contracts and adequate guaranty agency reserves, secondary markets will be unable to sell bonds to secure the liquidity necessary to purchase loans from lenders. As a result, lenders will not have the wherewithal to make

student loans and those lenders who do not want to hold student loans in their portfolios or who do not want to service the loans will be persuaded to abandon the GSL Program.

Overall Stability of the GSL Program. By approving repudiation of key terms of contracts with guaranty agencies and declaring that guaranty agencies have no property rights in their billions of dollars of reserves, the decisions of the courts below raise the specter that other important terms of the contracts may at any time unilaterally and retroactively be altered. Under these holdings, there is nothing to prevent Congress from changing reinsurance rates—*e.g.*, instead of reimbursing a guaranty agency for 100% of its insurance claims if its default rate is less than 5%, Congress could decide to reimburse at only a 60% level. Simply put, the principal participants in the GSL Program believe that if Congress has the lawful authority to change a term of the contracts as elemental as the guaranty agency's right to receive reinsurance payments, Congress has *carte blanche* to alter virtually any other term in any GSL Program contract. Furthermore, if the reserve funds are the property of the federal government, the Secretary is free to direct that those funds be used in any way he sees fit—even in ways which may preclude guaranty agencies from meeting their exclusive obligations to lenders. The mere possibility of such action is sufficient to chill the participation of guaranty agencies, lenders, and secondary markets in the GSL Program. The threat is acute because the courts below drew no limits on the Congressional power to ignore the contracts with guaranty agencies and unqualifiedly vested ownership of the reserve funds in the federal government.

II. The Holdings of the Courts of Appeals that Guaranty Agencies Have No Property Interest in Their Reserve Funds Contravenes Well-Established Relationships Among the Participants in the GSL Program

The decisions of the United States Courts of Appeals have held that because guaranty agencies have no property rights in their reserve funds, those funds may be confiscated by the Secretary without regard to the protections afforded by the Fifth Amendment. The United States Court of Appeals for the Eighth Circuit, for example, found that a guaranty agency's reserve fund is "entirely a creature of federal regulation" because federal regulations restrict the uses of the reserves to GSL Program purposes as well as the ways in which the guaranty agency may invest the reserves. Accordingly, the court ruled that "[b]ecause of the extensive federal regulation of EAC's reserve fund, . . . EAC has no ownership interest in its reserve fund that entitles EAC to protection under the fifth amendment." *Education Assistance Corp. v. Cavazos*, 902 F. 2d 617, 626-628 (8th Cir. 1990).

For the reasons set out below, these findings are without basis in fact or law and contravene the long-standing relationships among essential participants in the GSL Program.

First, neither the Higher Education Act nor the Secretary's regulations thereunder provide that a guaranty agency's reserve funds are the property of the federal government and that a guaranty agency has no ownership interest in those funds. The legislative history of the Act also fails to give any credence whatsoever to the assertion that the reserve funds are owned by the government. Furthermore, to NCHELP's knowledge, prior to the position which he has taken in the "excess reserves" litigation, the Secretary has never espoused the view that reserve funds are the property of the government. During the nearly 25 years of the GSL Program's operation, not a single rule, agency interpretation, "Dear Colleague" letter, item of

correspondence, general counsel opinion, judicial decision, or other pronouncement by any responsible official has stated that guaranty agencies do not have full property interests in their reserve funds. Guaranty agencies volunteered to participate in the GSL Program with the understanding that they had possession and control over the funds needed to meet their obligations. They have always operated on this premise.

Second, none of the contracts between the Secretary and guaranty agencies state that the reserve funds of a guaranty agency are the property of the federal government. Because the contracts were drafted by the Secretary, he could have easily asserted his ownership of the funds in those agreements if, at the time they were executed, the Secretary held the view that reserve funds were not the property of guaranty agencies. NCHELP believes that the Secretary did not include such language in the contracts because, until he was in need of a legal defense for his confiscation of "excess" reserves, guaranty agencies, lenders, and the Secretary all understood that reserve funds were owned by the guaranty agencies.

In this regard, it is instructive to note that in his early defense of lawsuits brought by guaranty agencies challenging the seizure of excess reserves, the Secretary did not argue that the funds were the property of the government. Instead, he contended that "the excess cash recovery provisions are in the nature of an additional reinsurance fee, rather than the recovery of federal monies already paid to the [guaranty agency]." *See Ohio Student Loan Commission v. Cavazos*, 709 F. Supp. 1411, 1416 (S. D. Ohio 1988). If it was clear from the statute, regulations, and contracts that the federal government owned the reserve funds, the Secretary would have asserted that defense in the first lawsuits which he faced. NCHELP submits that his failure to do so exposes this defense for what it is—a *post hoc* rationalization which has no foundation in law or fact.

Third, the determination that reserve funds are owned by the government is nonsensical from a business per-

spective. As explained above, Congress did not mandate that all guaranty agencies participate in the GSL Program—the decision whether to act as a guarantor for GSL purposes is purely voluntary for each guaranty agency. The law is equally clear that a guaranty agency, and only the agency, is responsible for its insurance obligations to the lenders with which it does business. Accordingly, it is absurd to conclude that a guaranty agency would voluntarily agree to be a guarantor for the GSL Program and thereby assume exclusive insurance obligations under contracts with private lenders without having possession or control over the funds necessary to meet its multi-million dollar obligations under those agreements.

Fourth, the courts below erroneously concluded that regulations issued by the Secretary on November 10, 1986 (34 C.F.R. §682.410(a)(2), (3)) which restrict the use of reserve funds to GSL Program purposes demonstrate that guaranty agencies do not have the requisite "indicia of ownership" to establish property rights in their reserves. Prior to the promulgation of these regulations, guaranty agencies were clearly free to use their reserves for non-GSL Program purposes provided that they had repaid any outstanding federal advances.

In July, 1986, five months before the Secretary issued his regulations, the United States General Accounting Office ("GAO") issued a report to Congress in which it examined permissible uses of guaranty agency reserve funds. In this report, which Congress and the Secretary used to help fashion the program for recovering excess reserves, the GAO stated: "Under program regulations . . . once federal advances have been returned, the use of the funds in agency reserves is no longer restricted to program purposes. Consequently, some agencies have returned their federal advances and used reserve funds for nonprogram purposes."[7] During its study, the GAO identified instances in which guaranty agency reserve funds had lawfully been

---

[7] U.S. General Accounting Office, *Guaranteed Student Loans—Better Criteria Needed for Financing Guaranty Agencies* 32 (July, 1986).

used for non-GSL purposes including, *inter alia*, aiding a state student loan program and placing the interest earned on a reserve fund into a general state fund.[8]

The GAO report demonstrates the serious misconception about the ownership of the reserve funds upon which the courts below predicated their decisions. Nowhere in that study does the GAO state that the reserve funds are the property of the federal government nor does that report recite any claim of ownership by the Secretary to those funds even though the GAO sought and obtained comments from the Department of Education before it published the report. More importantly, if the reserve funds were indeed the property of the federal government, GAO would certainly not have approved their use for purposes unrelated to the GSL Program or to any federal program at all. Furthermore, if the funds belonged to the federal government, the GAO would not have had to recommend that the Secretary adopt a regulation limiting the use of the reserves to GSL Program purposes[9] because such a rule would be unnecessary. In any event, it is patently clear that prior to the effective date of the November 1986 regulation, guaranty agencies had the right to use their reserve funds for any purpose provided that they had repaid any outstanding federal advances.

The Secretary's regulations limited the use of reserve funds to GSL Program purposes[10] but nowhere in the regulations or in the preamble thereto did the Secretary lay claim to the reserves of guaranty agencies. If the Secretary had intended his regulations to convert funds which were previously the property of guaranty agencies to the property of the federal government, his regulations should have clearly stated that such a monumntal change was

---

[8] *Id.*

[9] *Id.*

[10] Many guaranty agencies, including EAC, had already agreed to similar limitations on their reserve funds in reserve agreements with secondary markets and other financial institutions which collateralize bond issues and other borrowings.

being made in the GSL Program. Having failed to do so, the Secretary cannot now rely on those regulations as proof positive that the reserve funds are property of the government.

III. The Decisions of the United States Courts of Appeals Conflict With Earlier Decisions of this Court

As has been demonstrated, the GSL Program is predicated on contracts between the Secretary and guaranty agencies. A central issue in these lawsuits is whether, after performance by the guaranty agencies, Congress can amend the statute to repudiate obligations existing pursuant to those contracts. The United States Courts of Appeals have held that Congress may so repudiate government obligations. These decisions directly contravene important precedents laid down by this Court.

In *Lynch v. United States*, 292 U.S. 571 (1934), the Court held that Congress could not, by later repeal of the statute, repudiate insurance policies issued by the government pursuant to statute after having issued policies and accepted premiums on such policies. The law under which the insurance was issued did not contain a statutory reservation of the right to amend the statute or the contract, but the insurance policy contained language similar to that in the contracts and regulations at issue in these cases. The Court held that since no power to repeal the government's obligations was reserved by Congress *in the statute*, such a reservation could not be created by the administrator in regulations or contracts. *Id.* at 578. In ruling that the repudiation of the insurance policies violated the Fifth Amendment, the Court stated:

> [T]he repeal, if valid, abrogated outstanding contracts and relieved the United States from all liability on the contracts without making compensation to the beneficiaries.
>
> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor

> be a private individual, a municipality, a state or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.

Id. at 579. The Court explained that the laudable desire to effect "economy" in government operations did not justify the abrogation of contracts.

Lynch, then, stands for the proposition that where an obligee performs under a contract with the government, the government cannot by statute repeal its duties as obligor under the contract, where the authorizing statute does not retain the right to repeal such obligation. In *Lynch*, the statute contemplated a standard form of contractual relationship—insurance—the insured had paid the required premium, and the obligation of the government's performance was not subject to a power to amend or repeal *retained in the statute*. In light of those factors the beneficiaries' contractual right to performance was "property" for Fifth Amendment purposes.

Lynch is on all fours with the cases at hand. The contract authorized by the statute is a standard reinsurance contract for which the guaranty agencies have paid a reinsurance fee and met all other requirements as set forth in the contracts as consideration for the government's obligation to reinsure. The power to amend or repeal the government's obligation was not contained in the statute. Performance by the obligee of its contractual obligation, coupled with the fact that the right to repeal the government's obligation was not set forth in the statute, makes a guaranty agency's right to receive the government's obligated reinsurance "property" for Fifth Amendment purposes. Indeed, the 1986 amendments to the Act confirmed that guaranty agencies have a contractual right against the United States for reinsurance and administrative cost reimbursement. 20 U.S.C. §1078(c)(1)(A) (Supp. IV 1989).[11]

---

[11] The legislative history of the 1986 Amendment demonstrates that the intent of the "contractual right" provision was to emphasize the

The courts below relied heavily on this Court's decision in *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986). Such reliance is misplaced and has the effect of severely distorting this Court's holding in *Bowen*. In *Bowen*, the Court analyzed the Social Security Act which specifically retained the government's right "to alter, amend or repeal any provision of" the statute. Moreover, and perhaps most importantly for the application of *Bowen* to these cases, the "right" which was changed by the subsequent legislation was of a totally different character than that involved in *Lynch* or that now before this Court. The "right" claimed to be taken in *Bowen* was the right of a state to terminate an agreement to participate in the Social Security program. In essence, the question in that case was whether, by first offering states a discretionary opportunity to participate in the Social Security program, the federal government had foreclosed itself from later mandating such participation. As the *Bowen* court recognized, a state's right to terminate the participation agreement:

> bears little, if any, resemblance to rights held to constitute "property" within the meaning of the Fifth Amendment. The termination provision in the Agreement exactly tracked the language of the statute, conferring no right on the State beyond that contained in §418 itself. The provision constituted neither a *debt* of the United States, *Perry v. United States*, *supra*, nor an obligation of the United States to provide benefits under a contract for which the *obligee paid a monetary premium*, *Lynch v. United States*, *supra*. The termination clause was not unique to this Agreement; nor was it a term over which the State had any bargaining power or for which the State provided independent consideration. Rather, the provision simply was part of a regulatory pro-

---

validity of contracts which were already existing between guaranty agencies and the Secretary. H.R. Rep. No. 383, 99th Cong., 2d Sess. 38-39, *reprinted in* 1986 U.S. Code Cong. & Ad. News 2609-2610.

> gram over which Congress retained authority to amend in the exercise of its power to provide for the federal welfare. [Emphasis added.]

Id. at 55.

Unlike the situation presented in *Bowen*, the matter here involves an attempt by the government to refuse to pay benefits on a reinsurance contract for which a guaranty agency has fully paid its consideration. This is simply an attempt to repudiate a contract debt, an action which is squarely prohibited by the controlling precedent of *Lynch*. In *Bowen*, the Court specifically distinguished cases involving such public debt from its decision noting that:

> Congress' exercise of reserved power "has a limit" in that Congress could not rely on that power to "take away property. . . actually reduced to contracts lawfully made." . . . [And] that Congress does not have the power to repudiate its own debts. . .simply in order to save money.

Bowen, supra at 55. Guaranty agencies have both valid contracts and presently due debts which must be deemed "property" for these purposes.

The argument that it is not a breach of contract for Congress to further condition the right to receive reinsurance upon compliance with the "excess reserves" provisions of the Budget Act is entirely spurious. Semantics cannot change the nature of the action. NCHELP does not doubt that the result in *Lynch* would have remained the same had the government offered to pay the benefits to the beneficiaries of the insurance policies if only the beneficiaries would first pay the full sum of the benefits to the government.

The retroactive withdrawal of guarantees from loans already made is not merely a change in the participation conditions; it is, instead, a complete destruction of the consideration for the contracts. The benefit of the contracts to the guaranty agencies is the secure, dependable promise of reinsurance. That reinsurance guarantee is re-

lied upon by the guaranty agencies each and every time a loan guarantee agreement is entered into with a lender.

Lenders also rely upon the reinsurance guarantee by the government when evaluating the reliability of the guaranty agency insurance. Retroactive withdrawal of the reinsurance guarantee destroys the very essence of the agreements and threatens the stability of the entire GSL Program.

CONCLUSION

The holdings of the United States Courts of Appeals are legally erroneous. Their practical effect is to impair the very viability of the GLS Program. If the guaranty agencies can neither rely upon the government to make good on its debts when they come due, nor protect themselves by maintaining possession and control over reserves adequate to cover their liabilities, they can offer no reasonable guarantee to lenders. These holdings will cause grave injury to the GSL Program and will likely have far-reaching consequences for any state or private entity subject to federal restrictions on the uses to which its assets may be put—*e.g.* banks, insurance companies, government contractors, and non-profit corporations.

For the reasons herein, the Court should grant the petitions for writ of certiorari.

Dated this 11th day of September, 1990.

Respectfully submitted,

GEORGE G. OLSEN*
ROBERT E. JENSEN
WILLIAMS & JENSEN, P.C.
1101 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202)659-8201

**Counsel of Record*

Attorneys for Amicus Curiae

APPENDIX

MEMBERSHIP OF THE NATIONAL COUNCIL OF HIGHER EDUCATION LOAN PROGRAMS, INC.

1989-90

GUARANTY AGENCIES

Alabama Commission on Higher Education
Arizona Educational Loan Program (USA Funds)
Student Loan Guaranty Foundation of Arkansas
California Student Aid Commission
Colorado Student Loan Programs
Connecticut Student Loan Foundation
Delaware Higher Education Loan Program
Higher Education Assistance Foundation (DC)
Florida Department of Education
Georgia Higher Education Assistance Corporation
Higher Education Assistance Foundation
Student Loan Fund of Idaho, Inc.
Illinois Student Aid Commission
State Student Assistance Commission of Indiana
Iowa College Aid Commission
Higher Education Assistance Foundation (KS)
Kentucky Higher Education Assistance Authority
Governor's Special Commission on Education Services (LA)
Maine Department of Educational & Cultural Services
Maryland Higher Education Loan Corporation
Massachusetts Higher Education Assistance Corporation
Michigan Higher Education Assistance Authority
Higher Education Assistance Foundation (MN)
Mississippi Guaranty Student Loan Agency
Missouri Coordinating Board for Higher Education
Montana Guaranteed Student Loan Program
Higher Education Assistance Foundation (NE)
Nebraska Student Loan Program, Inc. (NSLP)
Nevada Educational Loan Program (USA Funds)
New Hampshire Higher Education Assistance Foundation
New Jersey Higher Education Assistance Authority
New Mexico Student Loan Guaranty Corporation
New York State Higher Education Services Corporation

North Carolina State Education Assistance Authority
North Dakota Guaranteed Student Loan Program
Ohio Student Loan Commission
Oklahoma State Scholarship Commission
Pennsylvania Higher Education Assistance Agency
Puerto Rico Higher Education Assistance Corporation
Rhode Island Higher Education Assistance Authority
South Carolina Student Loan Corporation
Education Assistance Corporation (SD)
Tennessee Student Assistance Corporation
Texas Guaranteed Student Loan Corporation
United Student Aid Funds, Inc.
Utah State Board of Regents-Utah Higher Education Assistance Authority
Vermont Student Assistance Corporation
State Education Assistance Authority (VA)
Washington Student Loan Guaranty Association
Higher Education Assistance Foundation (WV)
Great Lakes Higher Education Corporation (WI)
Higher Education Assistance Foundation (WY)

SECONDARY MARKETS/DIRECT LENDERS

Arizona Educational Loan Marketing Corporation
Western Loan Marketing Association
Arkansas Student Loan Authority
California Higher Education Loan Authority, Inc.
California Student Loan Finance Corporation
Colorado Student Obligation Bond Authority
C.A.L.S. c/o Connecticut Student Loan Foundation
Higher Education Loan Program of Washington, DC, Inc.
Student Loan Marketing Association (Sallie Mae)
Student Loan Fund of Idaho Marketing Association, Inc.
IDAPP (IL)
Indiana Secondary Market for Education Loans, Inc.
Iowa Student Loan Liquidity Corporation
Higher Education Loan Program of Kansas, Inc.
Maine Educational Loan Marketing Corporation (MEL-MAC)
The New England Education Loan Marketing Corporation (MA)

Michigan Higher Education Student Loan Authority
Mississippi Higher Education Assistance Corporation
Missouri Higher Education Loan Authority
Montana Higher Education Student Assistance Corporation
Nebraska Higher Education Loan Program, Inc. (NEBHELP)
New Mexico Educational Assistance Foundation
College Foundation, Inc. (NC)
Bank of North Dakota Student Loan Department
Student Loan Funding Corporation (OH)
Oklahoma Student Loan Authority
Rhode Island Student Loan Authority
South Dakota Student Loan Corporation
Abilene Higher Education Authority, Inc.
Central Texas Higher Education Authority, Inc.
Coordinating Board, Texas College & University System
Greater East Texas Higher Education Authority
Higher Education Servicing Corporation
South Texas Higher Education Authority
West Texas Higher Education Servicing Corporation
Virginia Education Loan Authority
Student Loan Finance Association (WA)
Higher Education Loan Program of West Virginia, Inc.
Wyoming Student Loan Corporation

LENDERS

Banc One Corporation
Bank of Boston
Bank of Horton
BayBank Boston, N.A.
Chase Manhattan Bank, N.A.
Chemical Bank
Citibank Student Loan Business
East Bergen Teachers Federal Credit Union
EDUCAID by Trans World Ins. Co.
First Interstate Bank of Arizona
First Interstate Bank of California
First Nationwide Bank
First Tennessee Bank, N.A.

Florida Federal Savings & Loan Association
Florida National Bank of Jacksonville
Franklin Federal Bancorp
Manufacturers Hanover Trust Company
Marine Midland Bank, NELC
Mellon Bank
MidAmerica Student Loan Company
Navy Federal Credit Union
Norwest Banks, N.S.
Pentagon Federal Credit Union
PSFS/Meritor Savings Bank
Southtrust Bank
Wachovia Bank & Trust Co., N.A.

OTHER ASSOCIATE MEMBERS

A.M. Miller & Associates, Inc.
AFSA Data Corporation
AMBAC Indemnity Corporation
American College Testing Program
Association of Independent Colleges & Schools
Baybanks Credit Corporation
Bear, Stearns & Co., Inc.
CBI/Equifax, Inc.
CSX Technology
CareerCom Corporation
Collection Technology, Inc.
Computer Data Systems, Inc.
Data Technologies, Incorporated
Debt Collectors, Inc.
Diversified Collection Services, Inc.
EDS Federal Corporation
Edudyne Systems, Inc.
Financial Collection Agencies, Inc.
First Wachovia Financial Services, Inc.
FM Services Corporation
General Revenue Corporation
HEMAR Service Corporation of America
HEMAR Loan Servicing Corporation of Utah
HHL Financial Services, Inc.
KRH Systems Consulting

Law School Admission Services
Llama Company
Management Adjustment Bureau, Inc.
Messerli & Kramer
National Association of Trade & Technical Schools
National Computer Systems, Inc.
Payco American Corporation
Peat, Marwick Main & Co.
Prescott, Ball & Turben, Inc.
Rauscher Pierce Refsnes, Inc.
Shearson Lehman Hutton, Inc.
Smith Barney, Harris Upham & Co., Inc.
The College Board
The Education Resources Institute (TERI)
The Fashion Institute of Design & Merchandising (FIDM)
Touche Ross & Co.
TRW Receivables Management Services
UNIPAC Service Corporation
University Loan Services, Inc.
Van Ru Credit Corporation
Windham Associates, Inc.